IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-160002 TRIAL NO. 15CRB-26105
Plaintiff-Appellee,	:	
vs.	:	
ANDRE BORDERS,	:	
Defendant-Appellant.	:	*JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Andre Borders was arrested after an altercation with his former girlfriend at her home. Borders was indicted for domestic violence under R.C. 2919.25(A), a first degree misdemeanor. Under R.C. 2919.25(A), "No person shall knowingly cause or attempt to cause physical harm to a family or household member." After a jury trial, Borders was found guilty and sentenced to serve 180 days at the Hamilton County Justice Center.

Borders appealed his conviction and asserts three assignments of error. We address his assignments of error out of order. In his second assignment of error, Borders contends that the trial court committed plain error by permitting the arresting officer to testify that he was the primary physical aggressor. As Borders recognized in his appeal, defense counsel did not object to this testimony during trial, forfeiting all but plain error. *See State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15. To demonstrate plain error, (1) there must be an

error, (2) the error must be plain, and (3) the error must have affected substantial rights. *State v. Hafford*, 1st Dist. Hamilton No. C-150578, 2016-Ohio-7282, ¶ 9, citing *Payne* at ¶ 16. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. We will not reverse for plain error unless Borders can prove that the outcome would have been different absent the alleged error. *Payne* at ¶ 17.

Here, the arresting officer testified on direct examination to his role in the investigation and to the circumstances surrounding his decision to arrest Borders, based upon his determination that Borders was the primary aggressor. Borders's defense attorney cross-examined the arresting officer at length concerning that exact issue. The arresting officer did not testify to the veracity of Borders's statements, but to his own perception of the incident after his investigation. We do not find error, let alone plain error, in the admission of this testimony. And even if admitting the arresting officer's testimony had been error, Borders has not demonstrated that the absence of this testimony would have affected the outcome of his trial. Therefore, we overrule his second assignment of error.

In his third assignment of error, Borders argues that the trial court erred in charging the jury with respect to the "family or household member" element of the offense of domestic violence in violation of R.C. 2919.25(A). We review a trial court's decision with respect to requested instructions for an abuse of discretion. *State v. White*, 1st Dist. Hamilton No. C-150250, 2016-Ohio-3329, ¶ 72. Jury instructions must be reviewed as a whole, and they must provide a correct, clear, and complete statement of the law. *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶ 90 (1st Dist.).

A "family or household member" includes a person who resides or has resided with the offender and either is "living as a spouse" or is "[t]he natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(a)(i) and (b). "Person living as a spouse" means a person who "is cohabiting with the offender, or who * * * has cohabited with the offender within five years prior to the date of the alleged [offense]." R.C. 2919.25(F)(2).

When the defendant and the victim share the same residence, the state does not have to prove cohabitation through evidence of financial or familial responsibilities and consortium. *State v. McGlothan*, 138 Ohio St.3d 146, 2014-Ohio-85, 4 N.E.3d 1021, ¶ 15. But when the victim and the defendant do not reside together, "[t]he essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium." *State v. Williams*, 79 Ohio St.3d 459, 463-465, 683 N.E.2d 1126 (1997), paragraph two of the syllabus; *McGlothan* at ¶ 13. Factors "establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." *Williams* at 465. Generally, the offense of domestic violence "arises out of the relationship of the parties rather than their exact living circumstances." *Id.* at paragraph one of the syllabus.

Borders contests the jury instruction only as to cohabitation. In this case, the trial court utilized the Ohio Jury Instructions, CR Section 519.25 (Rev. May 3, 2014), which took into account both *Williams* and *McGlothan*. After reviewing the jury instructions and the record, we do not find that the trial court abused its discretion

in its jury instruction for cohabitation. We overrule Borders's third assignment of error.

In his first assignment of error, Borders argues that "the trial court erred in finding [him] guilty, as the finding was based on insufficient evidence and was contrary to law."

Borders and the victim testified concerning their relationship history, with both individuals agreeing that Borders had lived with the victim for several months in 2013. The victim testified that while Borders lived with her in 2013, he had kept his clothes and shoes at her home and "would clean up[,] take out the trash," and cook occasionally. The victim believed that Borders was the father of her daughter, who was conceived while they were living together. The victim indicated that she had helped support Borders financially and had assisted him in caring for his young son. Borders admitted to have lived with the victim, but asserted that their relationship was purely sexual and that they had never "confirmed" that they were going to be in a relationship. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements of domestic violence under R.C. 2919.25(A) proven beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

Borders also asserts that his conviction is "contrary to law" by arguing that it is against the manifest weight of the evidence, because he was not the initial aggressor and had acted in self-defense. Self-defense is an affirmative defense that legally excuses an offender's admitted criminal conduct. *State v. Edwards*, 1st Dist. Hamilton No. C-110773, 2013-Ohio-239, ¶ 5. The offender has the burden of proving self-defense by a preponderance of the evidence. *See* R.C. 2901.05(A).

We recognize that this case is a matter of conflicting testimony. The victim testified that Borders was the primary aggressor, while Borders testified that the victim was the primary aggressor and that he had acted in self-defense. After reviewing the entire record, we note that there are inconsistencies in the victim's testimony. But after weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and resolving the conflicts in the evidence, we cannot conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that Borders's conviction must be reversed and a new trial ordered. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The jury was in the best position to determine the credibility of the evidence and the witnesses. *See State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116. We, therefore, overrule Borders's first assignment of error.

We affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on December 2, 2016
per order of the court _____.

Presiding Judge